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STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **BARRY M. ORLYN** **Member No. 37228** A Member of the State Bar.	)	**Case No.: 05-O-04575** **DECISION**

I. INTRODUCTION

For five years respondent Barry M. Orlyn (respondent) provided quality services to a bad client. His work included winning that client's case at trial and successfully defending the favorable decision on appeal. Respondent provided these services even though the client was continuing to fail to pay the fees that the client had agreed to pay. Unfortunately, when respondent finally recovered money on one of the judgments he had secured for the client, he unilaterally used the money to pay himself.

When dealing with a client, "self-help" by an attorney is not synonymous with "help yourself." Respondent is charged here with wilfully violating (1) Business and Professions Code section 6106 (moral turpitude-misappropriation)[1]; (2) rule 4-100(A) of the Rules of Professional Conduct[2] (failure to deposit client funds in trust account); (3) section 6106 (moral turpitude-

[1] Unless otherwise noted, all future references to section(s) will be to the Business and Professions Code.

[2] Unless otherwise noted, all future references to rule(s) will be to the Rules of Professional Conduct.

unauthorized endorsement); and (4) rule 4-100(B)(1) (failure to notify client of receipt of client funds). The court concludes that he is culpable of each of those alleged violations and recommends discipline as set forth below.

II. PERTINENT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed in this matter by the State Bar of California on May 16, 2007. On June 11, 2007, respondent filed a motion to dismiss the NDC for allegedly defective service. On June 11, 2007, the State Bar filed an opposition to that motion. On June 14, 2007, the motion to dismiss was denied. Respondent then filed what he captioned a "Notice of Exceptions."

On June 26, 2007, respondent filed his response to the NDC, denying all allegations except the allegation of jurisdiction. However, as a part of that response, respondent included a status conference statement in which he objected to the jurisdiction based on the two-year statute of limitations contained in Code of Civil Procedure section 340.6. On June 28, 2007, the State Bar filed a motion to strike the response and status conference statement. On July 9, 2007, that motion was denied and the case was scheduled for trial on November 29-30, 2007.

Trial was commenced and completed as scheduled, followed by a period of post-trial briefing. The State Bar was represented at trial by Deputy Trial Counsel Eli Morgenstern. Respondent acted as counsel for himself.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on the stipulation of undisputed facts and conclusions of law and on the documentary and testimonial evidence admitted at trial.

Jurisdiction

Respondent was admitted to the practice of law in California on June 14, 1965, and has been a member of the State Bar at all relevant times.

Facts

In 1999, Adrian Carrillo (Carrillo) sold an apartment building that he owned. In making that sale he utilized the services of a real estate broker, Victor Juarez (Juarez), and an escrow company, Accurate Escrow, Inc. (Accurate). During the time Carrillo was in the processing of closing the sale on the property, he was led to believe that he would net approximately $65,000 from the sale. When the escrow closed, he received $9,330.93.

On October 16, 1999, Carrillo employed respondent to investigate what had happened to the other proceeds from the sale. Because Carrillo did not speak or understand English well, he usually was assisted in his dealings with respondent by friends and family who served as interpreters.

At the initial meeting between Carrillo and respondent, there was discussion regarding the cost of respondent's future services but no written fee agreement was ever prepared or offered. Respondent required a $2,500 advance payment of fees, which amount Carrillo paid at the meeting. Although the initial focus of respondent's work was to investigate the situation, it was agreed that, if litigation became necessary, the cost of respondent handling the case through trial would be $5,000 (including the initial payment). It was further agreed that the additional $2,500 would be paid in advance once the decision to initiate litigation was made.

After being retained, respondent then gathered documents regarding the escrow, and a decision was then made that a lawsuit would be filed. On August 1, 2000, respondent wrote to Carrillo, both forwarding a copy of the complaint respondent had just filed on Carrillo's behalf against Juarez and Accurate and reminding Carrillo of his obligation to pay the additional $2,500 "balance." Despite this request by respondent, Carrillo paid no additional monies for another five months, until January 9, 2001, when only an additional $1,000 was paid. The receipt given

for this payment stated that the balance of $1,500 was to be paid by February 15, 2001. It was not. Instead, Carrillo made no further payment for more than five additional months, until July 5, 2001, when he paid another $1,000. The payment of the final $500 owed for the initial retention was made on July 16, 2001.

During the course of respondent's investigation and handling of the lawsuit, it became known that one of the principal reasons why the net proceeds of the escrow were substantially lower than what Carrillo had expected was because a lien had been made on the apartments by the Internal Revenue Service, acting on behalf of the Department of Justice. This lien was not for taxes, but instead was to collect a fine (and interest) that Carrillo had been ordered to pay as a result of being convicted in federal court of possession of stolen goods. Because Carrillo had been making monthly payments on this fine before he sold the apartments, he did not believe that he owed the total amount of $23,143.84 that Accurate had paid to clear the lien.

On December 4, 2001, following a court trial on December 3-4, 2001, the trial court found in favor of Carrillo against Accurate, based on negligence, and awarded Carrillo $8,400 plus costs. The court also found in favor of Carrillo against Juarez, based on fraud, and awarded the sum of $11,635. The court, however, declined to award as damages any portion of the monies that were paid by Accurate to the IRS to release the government's lien on the apartments.

Carrillo was present during the trial, accompanied by a friend acting as an interpreter. At the conclusion of the trial, respondent and Carrillo discussed the possibility of pursuing the federal government for what Carrillo still felt was an overpayment. Respondent indicated that he would require another $5,000 advance fee to perform that work. Carrillo stated that he did not have such funds available. Instead, he said that any additional payments to respondent would only be made after Carrillo had collected on the judgments against Accurate and Juarez.

Within a month of the conversation between Carrillo and respondent about pursuing the federal government, Accurate and Juarez filed notices of their intent to appeal the judgments against them. Respondent then wrote to Carrillo on January 22, 2002, reporting that these appeals were being taken and stating that Carrillo would need to pay an additional $5,000 fee for respondent to handle the appeal, which fee was to be paid in advance. Carrillo agreed to pay the additional $5,000 fee. Once again, no written fee agreement was offered or prepared by respondent. Then, although respondent undertook to handle the appeal, no payment was forthcoming from Carrillo.

Six months later, on July 17, 2002, respondent again wrote to Carrillo, reporting on a delay in the briefing caused by the failure of Juarez to file an opening brief. In this letter, respondent reminded Carrillo that the $5,000 payment was still due.

On July 29, 2002, respondent once again wrote to Carrillo, informing him that the appeal by Juarez had just been dismissed by the appellate court. This letter also contained a reminder of the need for Carrillo to pay $5,000. At that time, Carrillo's brief was due on August 21, 2002.

On August 15, 2002, Carrillo met with respondent and provided him with a check, albeit only for $1,000.[3] In this meeting Carrillo again told respondent that he did not have the funds available to pay the full $5,000 fee but reiterated that respondent would get paid when Carrillo got paid on the outstanding judgments.

Respondent went ahead and filed what proved to be a successful appellate brief on Carrillo's behalf. On January 14, 2003, the judgment against Accurate was upheld by the appellate court. On April 3, 2003, the court of appeal issued the remittitur.

At the time the appellate decision was handed down, Carrillo had still not paid any portion of the remaining $4,000 owed for respondent's work on the appeal. Respondent then

[3] In his testimony at trial, respondent agreed that this payment was for the appeal. "This was not for the trial anymore."

decided to seek an award of attorneys fees from Accurate, based on Civil Code section1717 ["In any action on a contract, where the contract specifically provides that attorney's fees and costs shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."] On April 10, 2003, respondent put together a "Statement of Services and Costs" (Statement) in which he itemized his daily activities on the file and purported to bill them at a rate of $250/hour. According to the Statement, respondent had worked 70 hours on the action, for which Carrillo was purportedly being charged $17,500. Total fees and costs added up to $18,215.25. After noting that Carrillo had already paid $6,000, the Statement reported an unpaid balance of $12,215.25. This Statement was then attached to a motion filed by respondent on Carrillo's behalf for attorney's fees on April 14, 2003. The motion included a declaration by respondent[4], but not one by Carrillo. At about the same time, the Statement was sent to Carrillo with a letter, dated April 10, 2003, reporting on respondent's plan to seek fees from Accurate. At no time did respondent ever seek any agreement by Carrillo to pay the amounts reflected in the Statement; nor did Carrillo ever agree to do so.

On May 8, 2003, the motion for fees was denied, based on the trial court's conclusion that liability was based solely on negligence, rather than on any breach of contract. Thus, according to the court, neither side was a prevailing party on the contract issue.

On the same day that the fee motion was denied, Accurate forwarded to respondent a check in the amount of $9,000, payable to respondent and Carrillo. The accompanying letter from Accurate's counsel stated, "You are authorized to cash this check upon receipt by this office of an original signed and notarize [sic] Satisfaction of Judgment."

[4] This declaration by respondent makes no statement that Carrillo had agreed to pay the fees reflected in the attached Statement.

Respondent did not inform Carrillo that he had received the Accurate check. Instead, he endorsed the check with both his own name and Carrillo's and then deposited it into his general office account.[5] No portion of the funds went into respondent's client trust account.

During the trial of this matter, respondent twice testified that he believed the liability of Accurate and Juarez for the two judgments (totaling $20,000) was "joint and several." The $9,000 check from Accurate was for more than the $8,500 judgment against it, but was for far less than the total of both judgments. On May 22, 2003, respondent nonetheless filed a "Full Satisfaction of Judgment" as to Accurate. The document, signed by respondent but only in his own name, stated, "The judgment creditor has accepted payment or performance other than that specified in the judgment in full satisfaction of the judgment." Respondent had not sought or obtained Carrillo's agreement to this compromise. Instead, there was no disclosure that any funds had been received from Accurate.[6]

Between May 2003 and March 2005, respondent made some additional efforts to collect money on Carrillo's behalf. These efforts were neither significant, nor successful. He eventually recommended that Carrillo retain a collection agency. With regard to pursuing the federal government for the possible overpayment, respondent wrote a three-sentence letter to the U.S. Attorney's Office in Los Angeles in December 5, 2002, requesting the government to "return all sums that were erroneously collected and received." There was no statement in that letter of how much the requested refund should be. At trial, there was no specific evidence of what response to the letter, if any, was ever received from the government. Thereafter, when

[5] There was no evidence at trial that respondent provided to Accurate's counsel any purportedly notarized signature from Carrillo.

[6] Respondent testified that he gave Carrillo oral notice that he had received payment the $9,000 judgment from Accurate. The court finds that respondent's testimony on that subject lacked credibility and conflicted with the credible testimony of Carrillo and Juanita Gonzalez (one of Carrillo's interpreters).

respondent inquired whether Carrillo wanted to hire him to pursue the matter further, Carrillo once again stated that he did not have the money to pay for that work. As a result, Carrillo never hired respondent to pursue the matter.

During the trial of this disciplinary proceeding, respondent sought to justify his conduct in endorsing the check with Carrillo's signature and then taking the entire $9,000 sum as his own attorney's fees by testifying that Carrillo had previously orally assigned his interest in the Accurate judgment to respondent. The court finds that no such assignment ever occurred. Carrillo testified credibly that he never agreed either to assign any portion of either of the two judgments to respondent or to allow respondent to pay himself from the proceeds of those judgments. The court further finds that respondent's testimony, that he believed at the time of his actions that there had previously been such an assignment, was neither reasonable nor true. Respondent testified that he based his belief on Carrillo's repeated assurances that respondent would get paid when Carrillo got paid. Carrillo agrees that he made such statements. Such statements, however, were not an agreement by Carrillo to transfer ownership of any portion of Carrillo's rights to the judgments.[7] Respondent testified that there was no other discussion of any possible assignment, that he never used the word "assignment" in any of his discussions with Carrillo, and that he never explained to Carrillo what an assignment is. Further, had there been such an assignment to respondent, respondent would have been obligated to take affirmative steps, documented in writing, to comply with the mandates of rule 3-300. Rule 3-300 provides,

[7] "While no particular form of assignment is necessary, the assignment, to be effectual, must be a manifestation to another person by the owner of the right indicating his intention to transfer, without further action or manifestation of intention, the right to such other person, or to a third person [citations]." (*Cockrell v. Title Ins. & Trust Co.* (1954) 42 Cal. 2d 284, 291; *McCown v. Spencer* (1970) 8 Cal. App. 3d 216, 226.) These words, or words to that effect, evidence a promise to pay rather than an assignment of Carrillo's interest in the judgment. (See *Lone Star Cement Corporation v. Swartwout* (E.D. Va. 1938) 93 Fed. 2d 767, 769-770 [the intention to vest the present right in the assignee must appear either by oral or written word or by conduct signifying a relinquishment of control by the assignor and an appropriation by the assignee]; *McKay v. Security-First Nat. Bank of Los Angeles* (1939) 35 Cal. App. 2d 349, 354.)

in pertinent part: "A member shall not … knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied: (A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and (B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and (C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition." In the formal "Discussion" accompanying the rule, its applicability to situations such as that here is made explicitly clear: "Rule 3-300 is intended to apply where the member wishes to obtain an interest in client's property in order to secure the amount of the member's past due or future fees." There was absolutely no effort by respondent to comply with any of the mandatory requirements of this rule.

The court's conclusion that respondent did not reasonably believe in May 2003 that there had previously been an assignment is further buttressed both by respondent's inability while testifying to provide any details regarding the transaction and by his acts and omissions at the time. At trial, respondent could not state when the assignment agreement was reached, choosing to relate it instead to all of Carrillo's comments during the relationship that respondent would get paid when Carrillo got paid. Nor could respondent describe the details of the assignment. The total amount of legal fees owed by Carrillo, even according to the Statement, was thousands of dollars less than the combined amount of the two judgments. Was the assignment for the entire amount of the judgments? If so, why? Was it only for a portion of the judgment? If so, how much? What consideration did Carrillo receive, in turn, for agreeing to transfer his property rights? Respondent's testimony on these details was vacuous and routinely came back to Carrillo's statement that respondent would get paid when Carrillo got paid.

Respondent's conduct is also remarkably inconsistent with his assertion that he became the beneficiary of a multi-thousand dollar assignment prior to May 2003. He generated no written confirmation of the transaction and made no reference to it in his correspondence. When he endorsed the check, he did not purport to do it as the assignee of Carrillo, but instead forged Carrillo's name to it. He also did not inform Carrillo of the fact that he had received the proceeds. Had he believed at the time that Carrillo had knowingly agreed to assign the monies to him, there would be no reason for respondent not to have disclosed his receipt of the funds. Conversely, if respondent held a valid assignment and was worried that Carrillo might deny or seek to impede respondent's right to use the assignment, he would be expected, as an experienced attorney, to have taken more steps to document the prior assignment, not less.

Count 1 – Section 6106 [Moral Turpitude – Misappropriation]

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption. While moral turpitude generally requires a certain level of intent, guilty knowledge, or wilfulness, a finding of gross negligence will support such a charge where an attorney's fiduciary obligations, particularly trust account duties, are involved. (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 410.)

Here, respondent knowingly and intentionally took funds that were owned by his client and converted them to his own use and benefit. He did this without notifying the client of what he was doing, either before or after the transaction. Although respondent purportedly was using those funds to pay fees owed to him by the client, the client never agreed to either the payment or to the amount of the fees. The amount of fees unilaterally collected by respondent, in fact, exceeded the amount of money to which he was entitled. Such conduct by respondent constituted an intentional and knowing misappropriation by him of his client's funds and a wilful violation of section 6106. There is no doubt that such wilful misappropriation of a client's funds

involved moral turpitude. (*Lipson v. State Bar* (1991) 53 Cal. 3d 1010, 1020-1021; *McKnight v. State Bar* (1991) 53 Cal. 3d 1025, 1033-4; *Bate v. State Bar* (1983) 34 Cal.3d 920, 923; *In re Freiburghouse* (1959) 52 Cal.2d 514, 516.)

Count 2 - Rules 4-100(A) [Failure to Deposit Client Funds in Trust Account]

Rule 4-100(A) provides that all funds received or held for the benefit of clients must be deposited in an identifiable bank account which is properly labeled as a client trust account and that no funds belonging to an attorney or law firm shall be deposited in such an account or otherwise commingled with such funds. As set forth above, respondent received a check made payable to his client and representing monies owned to that client. Instead of putting that check into his client trust account, respondent put the funds into his general business account. Such conduct by respondent constituted a wilful violation of his duties under rule 4-100(A).

Count 3 - Section 6106 [Moral Turpitude – Unauthorized Endorsement]

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption. The State Bar alleged that respondent committed an act involving moral turpitude by endorsing the check from Accurate with Carrillo's signature without the authorization, consent, or knowledge of Carrillo.

Unless expressly granted, an attorney does not have the authority to endorse a client's signature on negotiable instruments payable to the client. (*Palomo v. State Bar* (1984) 36 Cal.3d 785, 794-795.) Respondent acknowledged that he did not have express authority from Carrillo to sign Carrillo's name to the check. Instead, respondent claimed that he had the right to endorse the Accurate check with his client's name due to the fact that Carrillo had assigned his interest in the check to respondent. As previously explained, the court rejects this claimed justification.

Respondent's conduct here in endorsing Carrillo's name on the accurate check constituted another act involving moral turpitude and dishonesty, in wilful violation of section 6106.

Count 4 – Rule 4-100(B)(1) [Failure to Notify Client of Receipt of Client Funds][8]

Rule 4-100(B)(1) requires that a member "shall promptly notify a client of the receipt of the client's funds, securities, or other properties." Here, respondent admittedly failed to notify Carrillo of the receipt of the Accurate check. His conduct, as described above, constituted a wilful violation of his duties under rule 4-100(B)(1).

Statute of Limitations

Respondent contends that any culpability in this matter is barred by the applicable statute of limitations, which he argues is Code of Civil Procedure section 340.6. That contention is legally incorrect. That section relates only to civil actions filed against an attorney, not to this disciplinary action. (See Code Civ. Proc. §§ 307-308, 312, 335, 340.6.) The only enactment potentially creating a time limitation on the bringing of this proceeding is found in rule 51.

The five-year limitation of rule 51 does not bar discipline being sought or imposed for any of the acts of misconduct found in this proceeding. As noted, the NDC here was filed on May 16, 2007. Even assuming no tolling of the running of the period of limitations, the rule would operate to bar only violations occurring prior to May 16, 2002. All of the misconduct found here occurred after that date. When one adds into the assessment the fact that respondent continued to represent Carrillo until 2005, the conclusion that neither the proceeding nor the recommended discipline is barred by rule 51 becomes even more obvious. (See rule 51(c)(1).)

[8] The court notes that the first paragraph of Count Four in the NDC mistakenly included a reference to section 6106, rather than to rule 4-100(B)(1). Because the rule was twice specifically referred to in Count Four, once in its heading and once in its concluding paragraph, the court finds that this error did not result in any confusion or prejudice to respondent.

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).)[9]

Respondent's multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).)[10]

Respondent's misconduct significantly harmed his client. (Std. 1.2(b)(iv).) He also continues to retain the funds he misappropriated from his client.

Respondent has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) He remains defiant and has no insight regarding his unethical behavior.

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Standard 1.2(e).)

Respondent practiced law in California for 38 years prior to the commencement of the instant misconduct. During that span, respondent had no prior record of discipline. Respondent's lengthy tenure of discipline-free practice is entitled to significant weight in mitigation. (Std. 1.2(e)(i).)

IV. DISCUSSION

Respondent has been found culpable of violating section 6106, as well as rules 4-100(A) and 4-100(B)(1). In aggravation, the court considered the harm respondent caused to the client, as well as respondent's multiple acts of misconduct and his lack of insight regarding his

[9] All further references to standard(s) are to this source.

[10] Although the court concludes that respondent violated rule 4-100(B)(1), that violation arises from the same misconduct that provided the basis for finding culpability for violating section 6106. Accordingly, no additional weight is given this violation in determining the appropriate discipline. (*In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 595.)

behavior. In mitigation, respondent's 38 years of discipline-free practice prior to the commencement of the misconduct warrants significant consideration.

The most severe sanction is found at standard 2.2(a) which recommends disbarment for wilful misappropriation of entrusted funds unless the amount misappropriated is insignificantly small or the most compelling mitigating circumstances clearly predominate, in which case the minimum discipline recommended is a one-year actual suspension. Misappropriation of client funds has long been viewed as a particularly serious ethical violation. It breaches the high duty of loyalty owed to the client, violates basic notions of honesty, and endangers public confidence in the profession. (*McKnight v. State Bar, supra*, 53 Cal. 3d at p. 1035; *Kelly v. State Bar* (1988) 45 Cal. 3d 649, 656.)

The State Bar seeks disbarment. Respondent seeks dismissal. For the reasons noted *post*, the court believes that a two-year actual suspension, among other things, is sufficient but necessary to protect the public, the courts, and the legal profession from further misconduct. (Std. 1.3.)

In recommending disbarment, the State Bar cites several cases, including *Chang v. State Bar* (1989) 49 Cal.3d 114. In that case, Chang was found culpable, in a single-client matter, of misappropriating $7,900 in client funds, failing to provide his client with an accounting, and making misrepresentations both to his client and to the State Bar. In mitigation, Chang had no prior record of discipline in eight years of practice prior to the misconduct. In aggravation, Chang never acknowledged the impropriety of his conduct. In determining that Chang should be disbarred, the Supreme Court emphasized that Chang's lack of candor to the State Bar investigator and State Bar Court, the seriousness of the misconduct, and his lack of remorse or restitution gave reason to doubt whether Chang could conform his future conduct to the professional standards demanded of California attorneys. (*Id*. at p. 129.)

This court finds *Chang* to be distinguishable from the present case on two grounds. First, respondent had been practicing law with no prior incidents of discipline in this state for nearly five times as long as Chang. Second, the present case does not involve the same level of deceit and dishonesty that was reflected in *Chang*. The court does not have the same level of concern that respondent here will be unable or unwilling to conform his future conduct to his professional responsibilities.

The State Bar also cites to *Grim v. State Bar* (1991) 53 Cal. 3d 21, in support of its contention that respondent should be disbarred. In *Grim*, the respondent had deposited $7,021 of client funds into his client trust account but then used that money for his own purposes. His claimed reason for his misconduct was financial stress he was under at the time, a claimed source of mitigation rejected by the court. The case is distinguishable from the instant proceeding because Grim had not practiced for nearly as long as respondent here and had previously been disciplined for commingling funds in his trust account, misconduct noted by the Supreme Court to be similar to the Grim's new misconduct.

Instead, the court finds *In the Matter of McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364, to be more appropriate. In that case, McCarthy mishandled entrusted funds belonging to a limited partner in a Hawaiian real estate investment. McCarthy, who was a general partner and owed a fiduciary duty to the limited partner, was found culpable of misappropriating $20,946 in entrusted funds and conditioning a proposed civil settlement on the withdrawal of a State Bar complaint. In mitigation, the review department found McCarthy's unblemished career, spanning more than 40 years, to be a strong mitigating factor. (*Id*. at p. 383.) McCarthy also received consideration in mitigation for his good character evidence and his community service activities. In aggravation, the review department noted multiple factors including that McCarthy's misconduct was surrounded by concealment; that McCarthy's conduct

resulted in significant harm to the limited partner; and McCarthy's "lack of recognition of wrongdoing, lack of remorse, and failure to make any restitution, particularly after [the limited partner] obtained a municipal court judgment with respect to the $20,946 and a bankruptcy court finding of nondischargeability of the judgment." (*Id*. at p. 385.) Despite these aggravating factors, the review department found that disbarment was not necessary because this isolated instance of misconduct appeared to be aberrational, given McCarthy's lack of any prior record of discipline in over 40 years of practice. Therefore, the review department recommended that McCarthy be suspended for four years, that execution of the four-year suspension be stayed, and that McCarthy be placed on probation for three years on condition that, among other things, he be actually suspended for two years.[11]

There are many similarities between the present case and *McCarthy*. Both respondent and McCarthy were licensed attorneys in the State of California for approximately 40 years with no prior record of discipline. Both cases involve what appears to be an isolated incident rather than a pattern of misconduct. And although *McCarthy* did involve a larger amount of misappropriation, it also involved fewer counts of misconduct and more mitigation.

This court is aware of numerous cases where the respondent has been found culpable of misappropriation and discipline was imposed at levels below that recommended here. (See, e.g., *McKnight v. State Bar*, *supra*, 53 Cal.3d at p. 1035; *In the Matter of Robins* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 708.) Those cases are consistently distinguishable from the instant action due to either the presence of greater mitigating factors or the fact that the misappropriation resulted from gross negligence.

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[11] Comparable discipline was ordered by the Supreme court in *Lipson v. State Bar*, *supra*, 53 Cal. 3d 1010; *Snyder v. State Bar* (1990) 49 Cal. 3d 1302; and *Lawhorn v. State Bar* (1987) 43 Cal. 3d 1357; and was recommended by the review department in *In the Matter of Davis*, *supra*, 4 Cal. State Bar Ct. Rptr. 576; *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389; *In the Matter of Harris* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 219; and *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1.)

V. RECOMMENDED DISCIPLINE

For all of the above reasons, it is recommended that **Barry M. Orlyn** be suspended from the practice of law for four years and until: (1) he makes restitution to Adrian Carrillo, in the amount of $5,000[12], plus 10% interest per annum from May 8, 2003 (or to the Client Security Fund to the extent of any payment from the fund to Adrian Carrillo, plus interest and costs, in accordance with section 6140.5), and furnishes satisfactory proof thereof to the State Bar's Office of Probation; and (2) he provides proof to the satisfaction of the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law pursuant to standard 1.4(c)(ii); that execution of that suspension be stayed; and that respondent be placed on probation for three years, with the following conditions:

1. Respondent must be actually suspended from the practice of law for the first two years of probation and until: (1) he makes restitution to Adrian Carrillo, in the amount of $5,000, plus 10% interest per annum from May 8, 2003 (or to the Client Security Fund to the extent of any payment from the fund to Adrian Carrillo, plus interest and costs, in accordance with section 6140.5), and furnishes satisfactory proof thereof to the State Bar's Office of Probation; and (2) he provides proof to the satisfaction of the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law pursuant to standard 1.4(c)(ii).
2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all the conditions of this probation.
3. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation, his current office address and telephone number or, *if no*

[12] This amount reflects the excess of the funds retained by respondent over the amount of legal fees acknowledged by Carrillo to have been owed. If any subsequent accounting for services rendered remains unsatisfied, that is a collateral matter for respondent and Carrillo to resolve in an appropriate civil forum. (See *McKnight v. State Bar* (1991) 53 Cal. 3d 1025, 1039.)

office is maintained, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation, his current home address and telephone number. (See Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent's home address and telephone number will *not* be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

4. Respondent must report, in writing, to the State Bar's Office of Probation no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which respondent is on probation (reporting dates). However, if respondent's probation begins less than 30 days before a reporting date, respondent may submit the first report no later than the second reporting date after the beginning of his probation. In each report, respondent must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

    (a) in the first report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and

    (b) in each subsequent report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that period.

During the last 20 days of this probation, respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report

required under this probation condition. In this final report, respondent must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

5. Subject to the proper or good faith assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the conditions of this probation.

6. Within one year after the effective date of the Supreme Court order in this matter, respondent must attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of such completion to the State Bar's Office of Probation. This condition of probation is separate and apart from respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, respondent is ordered not to claim any MCLE credit for attending and completing this course. (Rules Proc. of State Bar, rule 3201.)

7. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter.

It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination within one year after the effective date of the Supreme Court's order in this matter. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.)

The court recommends that respondent be ordered to comply with California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

VI. COSTS

It is further recommended that costs be awarded to the State Bar in accordance with section 6086.10 and that such costs be enforceable both as provided in section 6140.7 and as a money judgment.

Dated: August 20, 2008

DONALD F. MILES
Judge of the State Bar Court